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RULE IN SHELLEY'S CASE CONTROLS ESTATE CREATED BY DEED TO TRUSTEE.—In the case of *McFall v. Kirkpatrick et al.* (1908), — Ill. —, 86 N. E. 139, the Supreme Court of Illinois had difficulty in deciding whether the rule in Shelley's Case would apply. The facts of this case were that a deed of bargain and sale with full covenants of warranty was made to a trustee to pay the rents and profits to Mrs. Houston during her natural life; a subsequent clause provided "Thirdly—in trust to convey the said land to such person or persons as * * * the said E. J. Houston by her last will * * * (may direct). And it is hereby expressly declared by the parties that upon the decease of the said E. J. Houston the said trusts shall cease and determine, and the land and premises above described shall belong in fee simple absolute to such person or persons as the said E. J. Houston shall as aforesaid direct and appoint, and in default of such appointment then to her heirs and assigns to her and their use forever." After the execution of this deed Mrs. Houston and her husband executed a warranty deed for the premises to Kirkpatrick, who by a bill in equity quieted the title of the trustee to the premises.

In spite of this conveyance to Kirkpatrick, Mrs. Houston in her last will devised the estate in fee simple to McFall, who brought an action of ejectment against Kirkpatrick. The court held, with three judges dissenting, that the action was not maintainable. The case turned on the construction of the clause of the deed given supra; the majority opinion was to the effect that by the deed Mrs. Houston took an equitable life estate and the heirs an equitable remainder. Under this construction the rule in Shelley's Case made the estate of the beneficiary a fee-simple. The power of appointment was appendant to this estate; her conveyance by full warranty deed destroyed the power, because it was incident to the estate. The subsequent attempt to exercise the power in favor of the plaintiff was therefore void and the action not maintainable.

The dissenting judges thought that the estate given to the heirs was legal, and that owing to the difference in the nature of the life estate and that in remainder, the rule in Shelley's Case did not apply. They believed that Mrs. Houston had only a life estate and that her power of appointment to the fee was in gross; if this belief was correct, the attempt to convey the fee did not divest her of the power of appointment. *Gaskins v. Finks*, 90 Va. 384. The devise conveyed the equitable title to the plaintiff, and as the trust became passive at the death of Mrs. Houston it was executed by the statute of uses investing the plaintiff with the legal title.

As the clause upon which this case hinges is worded peculiarly there is little authority exactly in point. The theory of the majority opinion is sustained by *Ralston v. Waln et al.*, 44 Pa. St. 279; *Sprague v. Sprague*, 13 R. I. 701; by the dicta in *Mott v. Buxton*, 7 Ves. Jr. (Eng.) 201, and *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918. PERRY, TRUSTS, Ed. 2, Vol. 1, § 305, gives the rule that "If any * * * power be imposed on the trustee as * * * to convey the estate, * * * the trusts or uses remain mere equitable estates." HILL, TRUSTEES, p. 232, is to the same effect.

The majority opinion went pretty far in construing the third clause to

require a conveyance to the heirs in case the power of appointment was not exercised; but even with that construction, this decision is contrary to the principles in *Williams v. Mears*, 2 Disn. (Ohio) 604, and *Adams v. Guerard*, 29 Ga. 651, 76 Am. Dec. 624, though in accord with the weight of authority. The dissenting opinion said that the heirs would have succeeded to the estate by force of the deed of trust without any other conveyance. Under this interpretation the estate of the heirs would be legal, and the rule in *Shelley's Case* could not apply. KALES, FUTURE INTEREST, § 129; *Ryan et al. v. Allen*, 120 Ill. 648. F. O.

THE RIGHT OF THE GARNISHEE TO DISPOSE OF GOODS IN HIS POSSESSION WHILE THE LITIGATION IS PENDING.—The plaintiffs were rice growers and had delivered a large quantity of rice to a milling company under a contract with the latter to mill and prepare the rice for market and sell the same. The plaintiffs were sued and the milling company summoned as garnishee. The latter refused to proceed with the milling and sale of the rice, believing that the effect of the garnishment summons was to suspend their rights under their contract with the plaintiffs. Finally the court ordered the company to proceed with the sale, but in the meantime the price of rice had declined, and a loss ensued. The garnishment proved to be wrongful, and the plaintiffs brought suit against the surety on the garnishment bond to recover the amount lost through the decline in the price during the pendency of the garnishment proceedings. *Held*, that the milling company was bound to proceed with their contract regardless of the garnishment; that the garnishing creditor was merely substituted to the rights of the principal debtor under the contract; that, therefore, the loss was caused by the failure of the milling company to fulfill its obligation, and was not proximately caused by the wrongful garnishment. *Moore & Bridgeman v. United States Fidelity & Guaranty Co.* (1908), — Tex. Civ. App. —, 113 S. W. 947.

This case involves a question upon which it is very difficult to find cases directly in point. In fact, the two cases cited as authority in the principal case, *Mensing v. Engelke*, 67 Tex. 532, 4 S. W. 202, and *McClellan v. Routh*, 15 Tex. Civ. App. 344, 39 S. W. 607, appear, so far as is disclosed by the report of the principal case, to involve a state of facts very different from that here involved. The former involved a garnishment where the goods were already subject to a pledge, while, in the latter, equities of a similar nature were involved. As to pledges and preëxisting mortgages, it is held that the rights of the garnishing creditor are subsequent thereto. *Cooley v. Minnesota, Etc., Ry. Co.*, 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609. But such is not the question in this case.

The principal case involves the question whether a garnishee having in his possession goods of another under a contract to prepare and market the same is at liberty to proceed under his contract and dispose of such goods after being summoned as garnishee, or whether he shall hold such goods to await the result of the suit and is excused from performance of his contract until the garnishment proceeding is determined. Upon this question there is a conflict of authority.